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IN THE

Supreme Court of the United States

SAN PAOLO U.S. HOLDING COMPANY, INC.,

Petitioner,

vs.

LIONEL SIMON, dba LIBERTY PAPER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION FOUR

PETITIONER'S REPLY BRIEF

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In support of its Petition for Writ of Certiorari (the "Petition"), Petitioner San Paolo U.S. Holding Company, Inc. ("San Paolo"), hereby responds to the Brief in Opposition (the "Opposition Brief") filed by Respondent Lionel Simon, dba Liberty Paper Company ("Simon"), as follows:

INTRODUCTION

In the Petition, San Paolo presents for this Honorable Court's review five questions of wide-ranging importance to civil litigants and courts throughout the Nation, especially in light of this Court's recent decisions in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) and *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408 (2003) clarifying the constitutional limitations on punitive damage awards. In his Opposition Brief, Simon ignores these issues and instead focuses on his own inflammatory, revisionist description of the facts of this case in an attempt to divert this Court's attention from these issues of paramount public interest and concern. In addition, Simon fails to explain why those who receive payment on constitutionally excessive punitive damage awards should not be required to compensate those who have been compelled to pay such awards for the loss of use of their funds.

In his Opposition Brief, Simon relies upon incorrect interpretations of the facts and the law while at the same time ignoring San Paolo's arguments, the facts of the case and applicable law. Simon improperly focuses on his erroneous interpretation and discussion of a "contract" between the parties (which, as Simon recognizes, did not in any way mention or have anything to do with interest) to avoid both the constitutional issues and the inescapable conclusion that San Paolo is entitled to interest. Simon even admits that he earned interest on San Paolo's funds, but cannot explain why he should keep it, other than his disagreement with the

decisions of both this Honorable Court and the California Supreme Court.

Simon also ignores the simple truth that the issues presented in this Petition arise out of the ruling of this Court during the pendency of the first Petition by San Paolo. This is sufficient to give this Court jurisdiction to grant this Petition and once again reverse the judgment of the Court of Appeal. There is no reason to require additional issues to create jurisdiction (even though they exist). This Petition is patently related to the two prior Petitions which were granted by this Court and this Court's denial of a stay in this matter, as a result of which Simon collected and kept the excessive award. The Petition is also related to the determination by the California Supreme Court pursuant to the recent decisions of this Court that the punitive damage award to Simon was constitutionally excessive and must be reduced from $1,700,000 to $50,000. Most importantly, Simon fails to and cannot explain why he and his counsel are entitled to retain over four years of earnings on an unconstitutional punitive damage award of over $2,000,000 which they never should have received.

ARGUMENT

Restitution is a legal, constitutional (not just an equitable) right, especially where, as here, the payment was the direct result of judicial action. Simon and his agents had possession of and used San Paolo's money and benefitted by, among other things, receiving interest thereon. In contrast, San Paolo is patently in a worse position due to the loss of the use of over $2,000,000 for over four years.

Simon attempts to avoid review by claiming that the Court of Appeal "never touched upon the Fourteenth Amendment or any due process argument, nor was it asked to . . ."

(Opposition Brief, p. 2.) To the contrary, the infringement of San Paolo's constitutional rights as a result of the grossly excessive punitive damage award has been at the very heart of San Paolo's Appeal for the past eight years and has been addressed by the Court of Appeal, the California Supreme Court, and this Honorable Court. Further, Simon's analysis is inapplicable, because, here, the issue arose as a result of this Honorable Court's denial of San Paolo's stay application during the pendency of its first Petition.

The issues presented by this Petition travel well beyond Simon's narrow view of this case as requiring just "contract interpretation under California common law." The right of a defendant to interest on a grossly excessive punitive damage award which it has been compelled to pay and is subsequently reversed (here, approximately four years later) is indeed an important federal constitutional matter which commands the attention of this Honorable Court. As Simon acknowledges, "this particular case involved a reduction of a punitive damage award, based on a federal constitutional question recently decided by this Court." (Opposition Brief, p. 9.) Simon, however, mistakenly asserts that "the Constitutional issue raised has been finally resolved." (*Id.*) Unless and until San Paolo is compensated for the damage it has suffered as a result of having been compelled to pay an unconstitutional punitive damage award, the constitutional issues in this case and infringement of San Paolo's rights remain unresolved.[1]

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[1] Similarly, the constitutional limitations on punitive damage awards continue to evolve. This Court recently agreed to review a $79.5 million punitive damage award (over 152 times the compensatory damage award) to the widow of an Oregon smoker against Philip Morris. *Philip Morris v. Williams*, United States Supreme Court Docket No. 05-1256. As the judicial scrutiny and concomitant reduction of constitutionally excessive punitive damage awards climbs, so will claims for restitution of sums paid (including interest thereon) by the victims of such awards. Accordingly, now is an opportune time for the settlement of these critical issues.

Contrary to Simon's misconstruction of San Paolo's Petition, the central issue is whether the Fourteenth Amendment requires that victims of excessive punitive damage awards who are compelled to pay those awards and who subsequently obtain a reversal or reduction thereof are entitled to compensation for the loss of the use of those funds which should have never been paid. San Paolo is not asking this Honorable Court to mandate that all states enact "mandatory . . . interest statutes following restitution after a reversal on appeal." (Opposition, p. 10.)

Simon misses the point in his Opposition Brief. In denying San Paolo interest at Simon's request, the Court of Appeal made a legal, not a factual, determination that the victims of constitutionally excessive punitive damage awards are not entitled to be compensated for the loss of the use of the funds paid on such awards. This is confirmed by the Court of Appeal's acknowledgment that "there are few factual issues to consider" and its election to decide this matter without any hearing. (Petition, App., A-6.)

How can there be restitution of payment of a constitutionally excessive punitive damage award when the recipient is not required to return to the payor all sums earned on that award, much less interest at the same legal rate imposed upon the payor through the date of payment of the improper award? Payment of interest on such an award does not result in a "windfall" to the defendant. To the contrary, it compensates the defendant for loss of use of the funds which it should never have been required to pay. Otherwise, the reduction of the unconstitutional punitive damage award would be nullified in whole or in part by permitting the recipient to retain the benefits of the use of such funds, here, over $2,000,000.00 for over four years!

Simon's attempts to distinguish the decisions supporting this Court's authority to review the decision of the Court of Appeal are unavailing. Simon even recognizes that, in

Baltimore & Ohio R. Co. v. U. S., 279 U.S. 781 (1929), this Court determined that, in awarding restitution, interest "at the rate established by the law of the state in which sums were paid" is appropriate. (Opposition Brief, p. 16.) Simon also cannot avoid the fact that "[t]he present controversy concerns the construction and effect to be given to the mandate" of this Court and that "the proceeding below out of which the denial of restitution arose is incidental to and in effect a part of the main suit. . . . This appeal rests on the same foundation as did the first." *Id.* at 784-785.

Simon also acknowledges that, pursuant to *Globe Indemnity Co. v. Puget Sound Co.*, 154 F.2d 249 (2d Cir. 1946), the award of interest is not discretionary where the recipient had use of the money prior to the reversal of the award. In another case cited by Simon, the Court determined that the defendant was entitled to post-judgment interest, because the plaintiff "has had use of this money since it was received." *Gerald M. Moore & Son v. Drewry and Assocs., Inc.*, 945 F. Supp. 117, 122 (E.D.Va. 1996). (Opposition Brief, p. 16.) Notably, Simon does not even address the decision of the Ninth Circuit Court of Appeals in *Caldwell v. Puget Sound Elec. Apprenticeship and Training Trust*, 824 F.2d 765, 767 (9th Cir. 1987) affirming the trial court's authority to grant restitution and recognizing "the right to recover what one has lost by the enforcement of a judgment subsequently reversed . . ."

By the actions of Simon and the Courts in this case, San Paolo was improperly deprived of the use of over $2,000,000 of its money for over four years, for which San Paolo is entitled to compensation. In light of the fact that the removal of the stay by this Court during the pendency of San Paolo's first Petition led to San Paolo's being forced to pay the constitutionally excessive award of punitive damages, this Honorable Court has the authority to grant the Petition, summarily reverse the Opinion of the Court of Appeal, and

require restitution, including the payment of interest at the legal rate.[2] (Petition, App., F-1; Opposition to Motion to Determine if Interest is Owed by Plaintiff ["Motion"], Exh. "C.") The Fourteenth Amendment is implicated in the denial of full restitution to San Paolo in the same way that it was implicated by the trial court's award of a grossly excessive punitive damage award against San Paolo. The same property rights and interests are at stake.

The prejudgment interest concept first raised by Simon and adopted by the Court of Appeal has nothing whatsoever to do with San Paolo's right to interest as restitution for the illegal punitive damage award. Similarly, Simon's fallback position (that the California statutory pre-judgment rate of interest of seven percent is the maximum amount of interest which he should be charged) is erroneous. Simon claims that, since he was never sure just how much of the unconstitutional punitive damage award would be reduced, the amount was unliquidated and therefore should not be subject to the post-judgment rate of interest. The truth is that San Paolo was required to pay interest at the post-judgment rate of ten percent. (Motion, Exh. "C.") Simon elected to collect on the judgment, even though San Paolo's appeal was still pending. He assumed the risk that, should the judgment be reduced, he would have to repay the amount of the reduction plus interest at the very same rate. There is no reason to assess any different rate of interest, nor any legal basis for doing so.

The fact that Simon could not foresee the actual results in this case does not defeat San Paolo's right to compensation for the loss of use of its own money. In every case where a

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[2] Had this Court continued the stay and then denied San Paolo's Petition, San Paolo could have been held to "answer for all damages and costs which the other party may sustain by reason of the stay." 28 U.S.C. § 2101(f). There is no reason why the same rule should not equally apply where the stay is denied and the judgment is paid and later reversed.

judgment is reversed or reduced, the plaintiff can make the argument that he could not have guessed what would happen and thereby avoid paying interest. Further, on two separate occasions, this Court reversed the decisions of the Court of Appeal affirming the punitive damage award. At a minimum, this should have been a sign that the award would ultimately be reduced. Simon, however, remained defiant. (Motion, Exh. "M.")

In addition, the cases which Simon cites regarding discretionary awards of pre- and post-judgment interest do not involve or in any way address the concept of restitution, the reversal or reduction of an award on appeal, or any of the issues presented by this Petition and therefore are of no assistance to Simon. (Opposition Brief, pp. 19-20.)

Simon highlights this Court's decision in *Morley v. Lake Shore & M. S. Ry. Co.*, 146 U.S. 162 (1892) to support his assertion that the award of interest in connection with the restitution of a reversed judgment which has been satisfied is "a matter within the legislative discretion of a state." (Opposition, p. 19.) Nothing within the *Morley* decision has any bearing on any of the issues presented in this Petition, including but not limited to interest as a component of restitution generally or, more specifically, San Paolo's entitlement to interest on the unconstitutional punitive damage award which it was forced to pay to Simon and which Simon repeatedly refused to return. In *Morley*, this Court instead held that where a statute alters the interest rate accruing on a judgment previously entered, there is no due process violation. Here, the issue is not the rate of interest which should have accrued on the judgment but whether San Paolo is entitled to that same rate of interest on the constitutionally excessive portion which it was compelled to pay.

There is clearly a conflict between this case and *Textron Financial Corp. v. National Union Fire Ins. Co. ("Textron")*, 118 Cal.App.4th 1061 (2004), which Simon fails to address.

Among other things, in *Textron*, the California Court of Appeal held that the defendant's underlying conduct should not be a factor in determining whether to award interest, choosing instead a more pragmatic approach.[3] Simon and the Court of Appeal in this case disagree. Such conduct certainly should be considered in determining the propriety of the award itself, but not whether interest should be awarded on the overpayment. Doing otherwise would result in a nullification of the reduction of the award and the constitutional protections afforded to defendants against such awards which are held to be grossly excessive.

Simon misconstrues the issues presented by the Petition. With regard to the interest rate itself, San Paolo most certainly is not arguing for "a federally mandated rate of interest of ten percent, applicable to all states and to all federal courts – presumably for all purposes." (Opposition, p. 20.) This is a blatant exaggeration intended to overshadow the clear constitutional significance of the issues raised by San Paolo. The issue, instead, is a defendant's right to recover interest at the same rate which accrued on a judgment which it was required to pay and is subsequently determined to be constitutionally excessive.

Defendants such as San Paolo who have been compelled by the Courts to satisfy improper judgments can be made whole only through restitution of the loss of the use of these funds. Their constitutional rights are not fully vindicated simply by returning the money they should have never been

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[3] "Defendant paid the judgment apparently when plaintiff threatened to execute on it. Had plaintiff chosen to await termination of the proceedings in the United States Supreme Court before seeking recovery, it would be entitled to interest on the sum finally awarded. To deny defendant recovery of interest on the excessive portion of the punitive damage award would be inequitable." *Textron*, *supra*, 118 Cal.App.4th at 1086.

required to pay. In order to fully protect their constitutional rights, defendants must be awarded interest at the applicable legal rate which they were required to pay (in this case, ten percent pursuant to Cal. Code of Civ. Proc., § 685.010(a)) for the period that they were deprived of these funds. At a minimum, all profits earned by Simon and his agents on the funds paid by San Paolo must be disgorged.[4]

In his Opposition Brief, Simon does not dispute any of the figures or calculations set forth in the Petition which demonstrate that, should this Honorable Court determine that San Paolo is entitled to interest at the legal rate for the funds which it was compelled to pay to Simon on the grossly excessive judgment, then the minimum restitution due to San Paolo is $925,743.27. (Petition, pp. 27-28.) Further, Simon does not dispute the fact that he has failed to pay the costs totaling $600.00 awarded by this Court on San Paolo's two prior Petitions.

CONCLUSION

This Petition provides this Honorable Court with the opportunity to assure the uniform, meaningful application by state and federal courts across this Nation of a party's right to restitution of all things lost as a result of being forced to pay a judgment or order which is reversed or reduced on appeal. Simon does not deny that the courts are in conflict as to the right of a defendant to recover interest in connection with the restitution of a payment made on an award which is ultimately determined to be improper. This Court's intervention is required to clarify that the denial of interest in this situation is a denial of due process.

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[4] Simon even admits earning interest on the funds paid directly to him, although it was in fact greater than the two percent acknowledged by the Court of Appeal. (Opposition, p. 21.)

The latest Opinion of the Court of Appeal demonstrates that the Courts and litigants of this Nation are in need of clear guidance on a party's right to recover interest on funds paid on a punitive damage award which is subsequently determined to be constitutionally excessive. The decision of the Court of Appeal eviscerates the goal of restitution, which is to restore to the victim of an excessive judgment all rights lost as a result of the payment thereof. In light of the fact that an excessive punitive damage award violates a defendant's constitutional rights, an award of interest on the amount overpaid in furtherance of this violation is a necessity.

Defendants who have been compelled to pay judgments which are subsequently reversed or reduced need a bright-line rule and certainty when seeking restitution. The only reasonable figure is the same as the rate which accrues on judgments. For these reasons, as well as those set forth in the Petition, it is respectfully requested that the Petition for Writ of Certiorari be granted, the Opinion of the Court of Appeal reversed (summarily or otherwise), and San Paolo be awarded interest at the rate of ten percent per annum on the overpayment amount, plus costs.

Date: July 26, 2006.

Respectfully submitted,

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